U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: January 4, 1990
CASE NO. 88-INA-337

IN THE MATTER OF

PARIS BAKERY CORPORATION
Employer

on behalf of

ERIC JOEL LOUIS JEGAT
Alien

Appearance: Paul R. Perdue, Esquire
For the Employer

BEFORE: Brenner, Guill, Litt, Marden Murrett, Romano, Tureck, Vittone, and Williams;
Administrative Law Judges

JOEL R. WILLIAMS
Administrative Law Judge.

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

The Board, on its own motion, has determined that this case should be considered, en banc.

Statement of the Case

The Employer, Paris Bakery Corporation, filed the application for labor certification on behalf of the alien, Eric Joel Louis Jegat, for the position of French Baker (AF 18-19). The duties of the position, as stated in the ETA 750 A, were "responsible for operation of baking equipment. Maintain production standards and schedules. Some supervision of bakery employees." The requirements for the position were four years experience in the job offered.

The application was accompanied by documentation showing that the position had been advertised from September 23, to 25, 1986[1] and from June 25 to 27, 1987. It was accompanied also by a statement from Jackie Jegat, who represented that he was the president and sole stockholder of Paris Bakery, a wholesale and retail French bakery which began business operations in October 1985. The company presently employed 9 individuals but only one baker. He went on to state:

> "Because of the demand for our products, the need to provide relief for our one baker, and a proposal to expand our production into two shifts, we are in need of additional bakers who are familiar with French baked products and French industrial baking methods.
>
> In the Summer of 1986, Eric Jegat was visiting from France. Knowing that he is an experienced baker, we asked if he would be interested in working in our bakery. He stated that he was interested in employment as a baker in our bakery.
>
> Mr. Jegat will be responsible for the operation of the baking equipment, and for the maintenance of production standards and schedules. When we expand our production into two shifts, Mr. Jegat will be responsible for supervising the activities of the workers on one of the bakery's shifts."

Jackie Jegat noted further that neither of the two recruiting attempts produced qualified applicants.

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[1] The September 1988 advertisement was under the same of Le Montmarte, Inc., which the record shows was a predecessor to and under the same ownership as Paris Bakery, Inc. (AF 27).

The record includes certifications to the effect that the Alien has had over four years as a French backer working in Paris, France. The only resume from a job applicant of record does not show that she had worked as a French baker.

The Certifying Officer, (C.O.), in his Notice of Findings (NOF) dated September 18, 1987, proposed to deny the application for certification (AF 14-16). Specifically, the C.O. asserted that the Employer violated section 656.20(c)(8) which requires that a bona fide job opening must exist to which qualified U.S. workers could be referred. The C.O. requested the Employer to document the names and address of its officers and their relationship to the Alien.

Additionally, the C.O. indicated that he intended to deny the application on the basis that the Alien's agent participated in interviewing or considering U.S. workers for the job contrary to the provisions of 20 CFR § 656.20(b)(3)(i) and (ii).[2]

The Employer, in its rebuttal dated October 8, 1987, responded to the C.O.'s questions (AF 10-13). The Employer stated, in part, that the President of the Corporation, Jackie Jegat, was the brother of the Alien. The C.O. denied the application in a Final Determination dated October 30, 1987 (AF 8-9), stating that no bona fide job opportunity existed as "it is highly unlikely that the [E]mployer would displace his brother with a U.S. worker."

He based the denial also on the grounds of the Alien's attorney's having participated in interviewing and considering U.S. applicants. The Employer filed a request for administrative review dated December 3, 1987 (AF 1-7) and filed a brief dated July 22, 1988. The C.O. did not file a brief.

Discussion

Initially we will take up the issue of whether the Employer violated the provisions of §656.20(b)(3)(i) and (ii) by the alleged participation of the Alien's attorney in the recruitment process. Although the cited subsections procribe [sic] the participation of an alien's agent or attorney in interviewing or considering U.S. workers for the job offered the alien, the record in this case does not establish that the attorney did, in fact, so participate. There were no interviews and the owner gives no indication that he consulted with the attorney before determining that there were no qualified U.S. applicants.

Section 656.20(c)(8) requires that "[t]he job opportunity has been and is clearly open to any qualified U.S. worker." In addition, the Employer has the burden of providing clear evidence that a valid employment relationship exists, that a bona fide job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker. Young Seal of America, 88-INA-121 (May 17, 1989) (en banc), citing, Amger Corp., 87-INA-545 (October 15, 1987).

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[2] The C.O. also proposed to deny the application on the ground of unlawful rejection of U.S. workers, but this was not a basis for denial in the Final Determination.

In Young Seal, cited above, the Alien's wife was a director of the Employer corporation, as well as its Chief Financial Officer and Corporate Secretary. The record also showed that she signed all of the correspondence concerning the application for certification and was the contact person for the position. Finally, the Alien came to the U.S. at the time of the Employer's incorporation, in the position for which certification was sought.

The Board, citing the above facts, affirmed the denial of certification in Young Seal, stating that:

> "In light of the marital relationship and the amount of control exercised by the Alien's spouse, it appears evident that the Alien is unlikely to be displaced by a U.S. worker. This fact, taken together with the fact that the Alien came to the United States at what appear to be the time of incorporation in the position for which certification is being sought, makes it hard to believe that a bona fide job opening was in fact available to U.S. workers. Therefore, we agree with the C.O.'s finding that the Employer has not met its burden to prove that the position represents a legitimate job opportunity for U.S. workers (AF 9), and uphold his denial of certification."

We did not hold nor did we mean to imply in Young Seal that a close family relationship between the alien and the person having the hiring authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for an employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of certification. Here there are not even arguably qualified U.S. applicants.

In the instant case, the Employee has represented that his growing business requires the need of an additional baker qualified in the type of French baking which is the hallmark of its business. The record is devoid of any evidence to contradict such representation. He has twice recruited for the position. The qualifications have not been challenged as restrictive. No qualified applicant has applied. Under these circumstances we conclude that the fraternal relationship is of no consequence. The Employer has demonstrated that there is a bona fide job offer open to all applicants and we find no reason to deny certification in this case.

ORDER

The decision of the Certifying Officer to deny the application for labor certification is reversed and certification is granted.

For the Panel:

JOEL R. WILLIAMS

Administrative Law Judge

Judge Guill, concurring:

I concur with the majority in granting certification. I write separately, however, to assure that proper emphasis is given to the fact that 20 CFR § 656.20(c)(8) places an affirmative burden on the employer to establish that the job opportunity "has been and is clearly open to any qualified U.S. worker." Where a familial relationship between an employer and the applicant alien ostensibly creates a preference for employment of the alien to the exclusion of qualified U.S. workers, the employer's burden increases in direct proportion to the facts surrounding the familial relationship.

The record herein establishes that Employer, a corporate entity, is solely owned by the Alien's brother. As a result, Employer has the burden of establishing that the job opportunity has been and is clearly open to any qualified U.S. worker. Stated another way, Employer must overcome its apparent preference to employ an alien family member over qualified U.S. workers. In considering whether Employer has met this burden, however, the decision maker must not become so enchanted with the fact that there is a familial relationship that the application is considered in a vacuum. In this matter there were no U.S. applicants with 4 years of experience in the job requirement of French baking. Thus, Employer's ostensible preference to employ his brother is a moot point since there were no U.S. workers who could have been prejudiced by the familial relationship. Accordingly, certification is appropriate.[1]

In the Matter of PARIS BAKERY CORPORATION, 88-INA-337
Judge LAWRENCE BRENNER, joined by Judges MARDEN and ROMANO, dissenting:

As noted by the majority, the Board affirmed the denial of certification in Young Seal, finding that "[i]n light of the marital relationship and the amount of control exercised by the Alien's spouse, it appears evident that the Alien is unlikely to be displaced by a U.S. worker." In our view, this is the key factor. This reasoning applies whether or not the Alien, as he did in Young Seal, came to the United States at the time of incorporation of the Employer.

The factual pattern presented in the case at bar is strikingly similar to that in Young Seal. The brother of the Alien, Jackie Jegat, is the President and Chief Executive Officer of the Employer corporation (AF 32). Jackie Jegat is also the sole shareholder of the Employer corporation (AF 12, 22) holding all the corporation's 250,000 shares (AF 27-29).

[1] In the Final Determination, the Certifying Officer made no finding that the job requirement was unduly restrictive. I agree with the majority that the record fails to disclose that the Alien's attorney participated in the recruitment process. Further, the C.O. did not proffer that the recruitment process was otherwise defective.

In addition, the record indicates that Jackie Jegat supervises the bakery's operations (AF 12). Jackie Jegat, as President of the Employer corporation, signed the application for labor certification on behalf of his brother (AF 18-19) as well as subsequent correspondence concerning the application (AF 11-13). Finally, the application states that the Alien's immediate supervisor would be the "Bakery Supervisor" (AF 18-19). Given the Employer's statement that Jackie Jegat supervises the bakery's operation, the position offered to the Alien would be under the direct supervision of the Alien's brother.

The evidence indicates that the Alien's brother, as President, Chief Executive Officer and sole shareholder of the Employer corporation, exercises ownership control over the corporation. Furthermore, as the supervisor of the position offered the Alien, as well as by signing the majority of the correspondence concerning the application, the record demonstrates that Jackie Jegat is personally involved in the hiring and supervision of the position offered for certification. Like our holding in Young Seal, these facts, taken together, clearly suggest that in light of the familial relationship and the amount of control exercised by the Alien's brother over the Employer corporation, the Alien is unlikely to be displaced by a qualified U.S. worker. Thus, we would affirm the denial of certification because the Employer has failed to prove that the job is clearly open to any qualified U.S. worker, in violation of section 656.20(c)(8).

LAWRENCE BRENNER
Administrative Law Judge